



The University
of Louisiana

MONROE

KXUL Radio

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December 16, 2002

Copyright Arbitration Royalty Panel
Notice of Intent: 2002-1 CARP DTRA 3
Library of Congress, Copyright Office
P.O. Box 70977, Southwest Station
Washington, DC 20024

Pursuant to the Copyright Office's Order dated November 15, 2002, enclosed are an original and five copies of a notice of intent to participate in the Copyright Arbitration Royalty Panel, Docket Number 2002-1 CARP DTRA 3.

Please date stamp the additional enclosed copy of our notice and return it to us in the provided self-addressed stamped envelope.

Respectfully submitted,

Joel R. Willer
Assistant Professor of Mass Communications
and KXUL Faculty Supervisor
University of Louisiana at Monroe
120 Stubbs Hall, 401 Bayou Drive
Monroe, Louisiana 71209
(318) 342-1426

**Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, DC**

Digital Performance Right In
Of Sound Recordings and
Ephemeral Recordings

)
)
) Docket No. 2002-1 CARP DTRA 3
)
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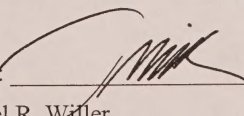
NOTICE OF INTENT TO PARTICIPATE

Pursuant to the Copyright Office's Order dated November 15, 2002, the University of Louisiana at Monroe, a state-assisted institution of higher education in the University of Louisiana System, hereby gives notice of its intent to participate, on behalf of FCC-licensed noncommercial educational radio station KXUL, in the Copyright Arbitration Royalty Panel proceedings to adjust royalty rates and terms under the statutory license for eligible nonsubscription services to make certain digital audio transmissions of sound recordings for the 2003-2004 period.

Congress, in 17 U.S.C. § 802 (c), has provided the Library and the arbitration panel great latitude in determining the manner and proportion of arbitration panel costs to be borne by participants. Noncommercial radio station KXUL, funded entirely by student fees dedicated to the broadcast operations of the station, has very limited financial means to participate in the CARP arbitration proceedings. We therefore request a waiver of all arbitration panel costs in order that the record of the CARP might be fully developed with regard to information relevant to noncommercial broadcasters such as KXUL.

Respectfully Submitted,
University of Louisiana at Monroe

By: _____


Joel R. Willer
Assistant Professor of Mass Communications
and KXUL Faculty Supervisor
120 Stubbs Hall, 401 Bayou Drive
Monroe, Louisiana 71209
(318) 342-1426



25 February 2003

Via Federal Express

Copyright Arbitration Royalty Panel
ATTN: CARP Specialist
c/o Federal Express
208 Second Street, S.E.
Washington, D.C. 20003

(Ref. Tel. 202-707-8380)

Re: Motion to B ifurcate
Docket No. 2002-1 CARP DTRA 3

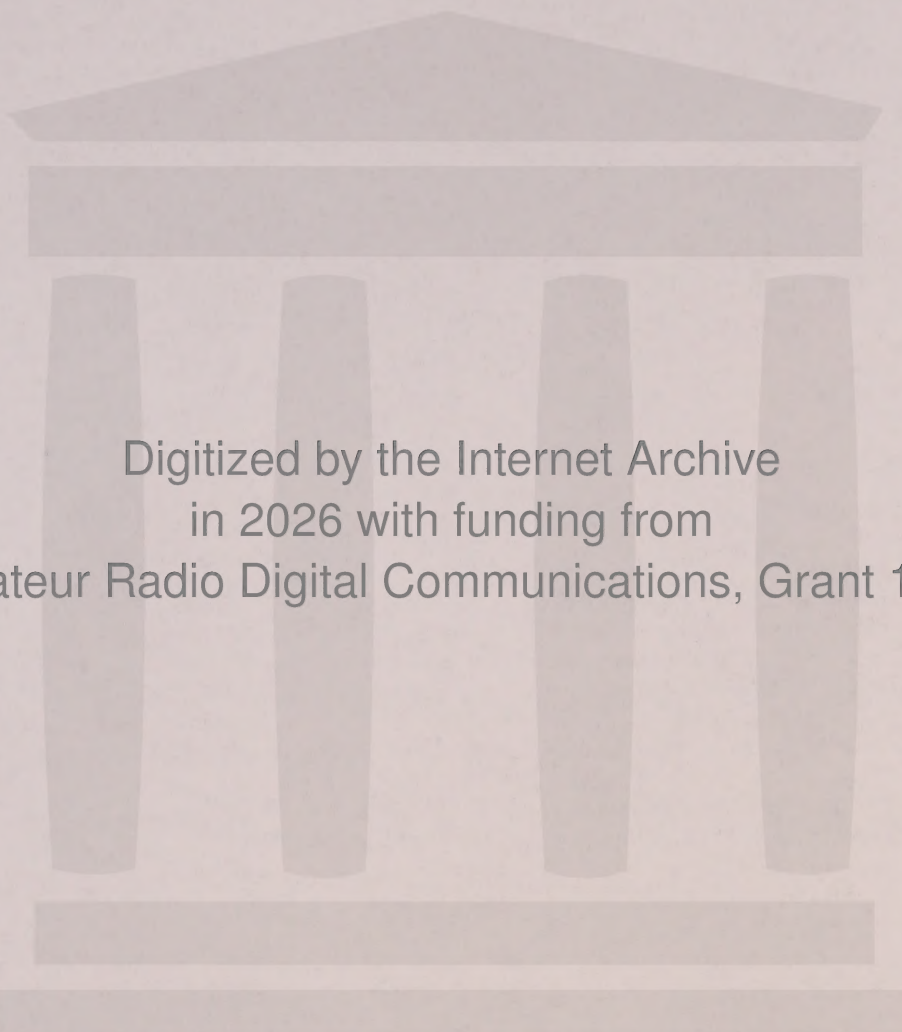
Dear Panel:

Collegiate Broadcasters, Inc., through counsel, hereby submits for filing its **Response to Motion to Consolidate CARP Proceedings and Motion to Bifurcate or Stage Proceedings for Commercial and Noncommercial Webcasters**, as well as Proof of Service on the interested parties. Pursuant to 37 CFR §§ 251.45(b)-(e), please find for filing an original plus five (5) copies of this motion, including proof of service on all interested parties. We also are enclosing a copy of this pleading and request that you conform and return this to our office in the self-addressed, stamped envelope provided.

Thank you for your attention to this matter. Please do not hesitate to contact me if you have questions. My direct telephone number is: (650) 724-0517.

Sincerely,

Elizabeth H. Rader
Attorneys for Collegiate Broadcasters, Inc.



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Amateur Radio Digital Communications, Grant 1659

<https://archive.org/details/copyright-arbitration>

**Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.**

In Re	)	
Digital Performance Right	)	Docket 2002-1 CARP DTRA 3
In Sound Recordings and	)	
Ephemeral Recordings	)	
	)	

**RESPONSE TO MOTION TO CONSOLIDATE
CARP PROCEEDINGS;
AND
MOTION TO BIFURCATE OR STAGE PROCEEDINGS FOR COMMERCIAL
AND NONCOMMERCIAL WEBCASTERS**

RESPONSE

Collegiate Broadcasters, Inc. ("CBI") responds in this pleading to the motion of The Digital Media Association ("DiMA"), America Online, Inc., Listen.com, Inc., MusicMatch, Inc. and Yahoo! Inc. (the "Webcasters"), filed February 14, 2003, for an order consolidating the 2003 – 2004 Copyright Arbitration Royalty Panel ("CARP") proceedings for eligible nonsubscription services and new subscription service. CBI agrees that the proposed consolidation could save the moving parties and the Copyright Office some expense and effort. CBI opposes consolidation, however, insofar as it would require noncommercial entities that are statutory licensees only for nonsubscription services to participate in all phases of the consolidated CARP. A longer proceeding with more parties and issues would increase the participation costs for noncommercial licensees for nonsubscription services to the point where they might have to forego participation entirely. Under these circumstances, it would be manifestly inefficient and unfair to require noncommercial entities, which are distinctly different from the

commercial webcaster moving parties, to participate in consolidated CARP proceedings without some provision to limit their expenses.

CBI would support the motion to consolidate, however, if the Copyright Office grants its Motion to bifurcate or stage the proceedings, set out below. A bifurcated or staged proceeding, with a first, commercial, stage and a second, non-commercial, stage, if necessary, commencing after May 31, 2003, would enable the consolidation the commercial webcasters seek, yet still substantially reduce the cost for noncommercial webcasters. Indeed, this proposal will improve the likelihood that noncommercial entities and copyright owners will reach an agreement as provided for under the Small Webcasters Settlement Act ("SWSA"), avoiding expense for all parties and for the Copyright Office. This proposed solution will also allow the Copyright Office to resolve an apparent scheduling conflict that has arisen between the Copyright Office Order dated February 6, 2003 and the SWSA.

**MOTION TO BIFURCATE OR STAGE CARP PROCEEDINGS FOR
COMMERCIAL AND NONCOMMERCIAL WEBCASTERS**

CBI moves that the Copyright Office bifurcate or stage the CARP proceeding to allow noncommercial entities until May 31, 2003 to settle with the copyright owners, as provided in the SWSA. CBI proposes that the Office order that noncommercial entities present their Written Direct cases by on or about August 5, 2003, if the noncommercial entities and copyright owners have not reached an agreement May 31, 2003. Setting a two-stage schedule would be a procedural ruling within the Office's authority, and it would resolve the current conflict between the deadline for Notices of Settlement in the Scheduling Order and the deadline for settlement in the SWSA. In that way, it would

accord with Congress's intent to allow the noncommercial stations more time to negotiate agreements after the commercial settlement period. It would serve the interest of efficiency, by separating the evidence of parties-- commercial and noncommercial webcasters -- that are recognized as distinct and requiring different treatment, and could avoid the need for stage II entirely. It would serve the interest of fairness by allowing the commercial proceedings to be consolidated without causing the noncommercial parties to incur additional, unbearable expense when they are barely able to afford to participate as it is. The proposal would not prejudice commercial webcasters or copyright owners and would help them by streamlining the commercial stage.

A. A Two-Stage Proceeding Would Avoid Conflict Between the Order and the SWSA

On November 15, 2002, the United States Congress passed the SWSA to address the concerns of webcasters, including educational and other noncommercial webcasters, in light of the royalty rates and fees set in the previous CARP, by, *inter alia*, authorizing settlements including different royalty schemes, for certain time periods. The President signed the SWSA into law on December 4, 2002. The SWSA treats commercial and noncommercial entities differently in various respects. Section 4(F) of the SWSA provides that noncommercial entities and copyright owners have until May 31, 2003 to negotiate a voluntary agreement: "the authority to make settlements pursuant to subparagraph (A) shall expire December 15, 2002 except with respect to noncommercial webcasters for whom the authority shall expire May 31, 2003"). See Pub. L. 107-321, 116 Stat. 2780. The SWSA contemplates agreements covering the period from October 28, 1998- December 31, 2004, which obviously includes the period covered by this CARP.

The Copyright Office's February 6, 2003 Order conflicts with Section 4(F) of the SWAA, however, and frustrates Congress's intent to allow RIAA to settle with commercial webcasters before reaching an agreement with the noncommercial webcasters, to the extent that the Order purports to create a deadline for all settlements of March 1, 2003, three months earlier than the deadline Congress provided for noncommercial licensees—May 31, 2003—and a deadline of March 5, 2003 to notify the Copyright Office of such settlements. *See* Order in Docket No. 2002-1 CARP DTRA3, dated February 6, 2003.¹ The Copyright Office could resolve this conflict, and improve the efficiency of the proceedings, by bifurcating or staging the proceedings so that the copyright Owners and commercial copyright licensees could present their Written Direct Cases first, on the schedule set out in the Order, and then, if noncommercial entities do not reach settlements by the SWSA deadline of May 31, 2003, the second, noncommercial stage would commence. This two-stage proceeding would enable the commercial copyright users to enjoy the benefits of consolidation, without putting noncommercial copyright users to the expense of participating in the entire consolidated proceeding. It would also improve the likelihood that the copyright owners and noncommercial entities will reach a settlement, avoiding the need for the second stage entirely.

There is reason to expect that noncommercial entities can reach a voluntary agreement with the sound recording copyright owners before the deadline set by

¹ This motion is timely because until the Copyright Office issued its February 6, 2003 Order, CBI was entitled to expect that it would have the full time provided by Congress in the SWSA to attempt to reach a settlement with SoundExchange. Only after the Order was issued did the issue of its conflict with SWSA, with regard to noncommercial entities, become apparent. The webcasters' Motion for Consolidation further increases the need for a staged proceeding by potentially increasing the cost of participation, which is already exorbitant.

Congress, May 31, 2003. Negotiations in good faith have begun. CBI believes, however, that the copyright owners are more likely to enter into an agreement with noncommercial entities after they have concluded negotiations with commercial webcasters. This would be consistent with Congress's two-stage settlement schedule in the SWSA, which called for commercial settlements by December 15, 2002 for the previous CARP periods but gave noncommercial entities an additional six and one half months to come to an agreement with the copyright owners. Asking the noncommercial entities to begin preparing Written Direct Cases and serving and responding to discovery before the time has elapsed for settlement under the SWSA discourages, rather than encourages, settlement. This is inefficient and unfair.

B. The Office Should Bifurcate or Stage the Proceedings in the Interests of Efficiency and Fairness

Bifurcating or "staging" the CARP proceeding to provide for noncommercial entities to reach settlements by May 31, 2003 and, if no settlement is reached, to file their Written Direct Cases on or around August 5, 2003 makes eminent sense and is warranted by present and past circumstances. The Copyright Office appreciates these circumstances:

The nonsubscription digital audio service (webcasting) CARP proceeding of the last year has further underscored the shortcomings of the statutory CARP system for setting royalty rates and terms under the statutory licenses of the Copyright Act. When the Library called for Notices of Intent to Participate in that proceeding, it received a multitude of Notices from webcasters desirous to tell their story once the CARP convened. However, many dropped out when they realized they were required to prepare written direct cases, submit to discovery and present oral testimony to the CARP, all the while helping to pay the arbitrators' bills.

Order at 8. Given their extremely limited funds, these noncommercial entities could not

take the risk that they would be required to pay arbitration fees many times their entire annual budgets. Indeed, they learned later that parties that participated incurred costs of hundreds of thousands to millions of dollars. Therefore the noncommercial would-be CARP participants one by one withdrew, except the comparatively well-funded Corporation for Public Broadcasting (“CPB”) and National Religious Broadcasting Music License Committee (“NRBMLC”), which represents both commercial and non-commercial religious stations. As a result, as the Panel noted, “Unfortunately, determination of the willing buyer/willing seller fees for non-CPB affiliated, non-commercial radio stations (“non- CPB broadcasters”) presents an extraordinary challenge. Despite admonitions to all counsel from the Panel as early as September 7, 2001 (well prior to the rebuttal phase), the record remains virtually barren respecting such broadcasters.” *See* Tr. 9009-13. “The record tells little about those non-CPB broadcasters that are represented by the NRBMLC, and virtually nothing about those that are not.” The Panel nevertheless concluded, “Applying the same commercial broadcaster rate to non-commercial entities affronts common sense.” CARP report at 89.

There is a danger of history repeating itself in this CARP if the Copyright Office does not make some provision to enable noncommercial entities to participate. While the Copyright Office has deemed itself without Congressional authority to accept the proposals of IBS and Music Choice to amend certain rules to permit small entities to participate, CBI’s proposal for a bifurcated or staged proceeding provides the Copyright Office with a way within its authority to address this issue and to improve the likelihood that stage II can be avoided, entirely, by the copyright owners and noncommercial licensees reaching an agreement before May 31, 2003.

The Copyright Office suggests that participants “pool their resources with similarly situated and like-minded webcasters, engaging common counsel to represent their interest and striking alliances with other parties in the proceeding on issues where they are in agreement.” Order at 15. This suggestion is well meant and well taken. Noncommercial webcasters, however, are a diverse group, not necessarily similarly situated and like-minded. Their core ideologies, goals, and financial and other resources vary among the entities and representative organizations. This is reflected, for example, in the staggered rate schedule for different kinds of entities, established for royalties under Section 118. Statutes and their legislative histories distinguish not only between commercial and noncommercial broadcasters, but distinguish among the various species and subspecies of educational and noncommercial stations. In short, there may not be enough common ground for consolidated efforts to yield enough efficiency to outweigh the expense of cooperation among entities which are, at bottom, competitors. Thus the suggestion that all noncommercial stations and groups can work together does not go far enough to address the issue, as the Register of Copyrights perhaps recognized in suggesting that the arbitrators should be paid from public funds to facilitate wider participation. Order at p. 7. Even combined, the educational and other noncommercial entities’ extremely limited resources may not be enough, even with *pro bono* counsel, to afford the costs associated with the CARP. In contrast, bifurcating the CARP proceedings would allow the noncommercial entities to save costs by sitting out Stage I, while the commercial entities present their cases, and continue trying to reach settlement, and then, if necessary, present their own cases to the best of their ability during Stage II. The noncommercial stage, if even necessary, could be shorter because CBI, for example,

would not need to independently gather and present evidence already offered by, for example, the commercial webcasters. The copyright owners would not be prejudiced and, indeed, would also benefit from the more efficient bifurcated proceeding, especially if settlement negotiations are successful. The Panel could consider all evidence introduced in the commercial stage as well as the evidence presented in the noncommercial stage. All evidence, however, would be subject to cross-examination. If the RIAA and noncommercial entities are able to reach an agreement before May 31, 2003, the RIAA would also avoid the expense of the noncommercial stage, as would the Copyright Office itself. As the Copyright Office has concluded, “there is good reason to fashion a system that permits consideration of the views of all affected parties—large and small—before a final determination is reached.” Order at 9.

C. The Librarian is Authorized to Make Procedural Rulings to Apply to the CARP Proceedings, Such as Bifurcating or Staging the Proceedings

CBI submits that the Copyright Office has the authority to bifurcate or stage the CARP proceedings as proposed because this is a simple procedural matter. *See* 65 Fed. Reg. 77393, 77394 (Dec. 11, 2000). The Copyright Office has employed the procedural device of consolidation in the past, most recently in connection with the determination of rates and terms for nonsubscription services for the periods 1998-2000 and 2001-2002. 65 Fed. Reg. 77393. Here, the proposed staging would serve the same goals as consolidation, namely efficiency and fairness. Moreover, Section 801(c) of the Copyright Act provides the Librarian of Congress, upon recommendation of the Register of Copyrights, with broad authority before a CARP is convened to “make any necessary procedural or evidentiary rulings that would apply to the proceedings conducted by such

panel... .” It is thus plainly within the Copyright Office’s authority to stage the CARP proceedings, and to establish different schedules for commercial and noncommercial copyright user participants so as to conform to Congress’s intent to stagger the settlement negotiations, as expressed in the SWSA, and to maximize efficiency and fairness.

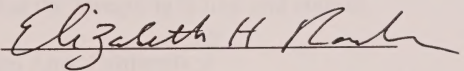
CONCLUSION

For the reasons stated above, the Copyright Office should issue a revised scheduling Order that gives noncommercial webcasters the full time in which to negotiate a settlement provided by the SWSA, and provides that absent a settlement noncommercial entities’ Direct Written Cases shall be due two months after May 31, 2003. Absent this relief for noncommercial entities, however, CBI must oppose consolidation as unduly burdensome for parties, such as CBI, that only intend to participate in the nonsubscription CARP.

Dated: February 25, 2003

Respectfully submitted,

Stanford Law School
Center for Internet & Society

BY: 

Elizabeth H. Rader

559 Nathan Abbott Way
Stanford, CA 94305-8610
Telephone (650) 724-0517

Attorneys for Collegiate Broadcasters, Inc.

PROOF OF SERVICE

I, Joanne Newman do hereby certify and declare as follows:

I am over the age of 18 years, and not a party to the instant proceedings. I am employed in the county of Santa Clara, California. My business address is: 559 Nathan Abbott Way, Stanford, California.

On February 25, 2003, I caused to be served the following document:

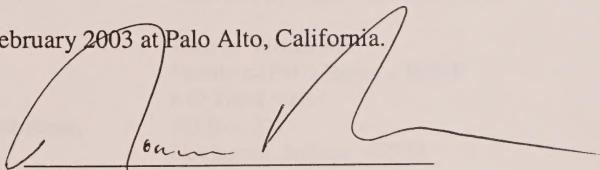
**RESPONSE TO MOTION TO CONSOLIDATE CARP PROCEEDINGS
AND
MOTION TO BIFURCATE OR STAGE PROCEEDINGS FOR
COMMERCIAL AND NONCOMMERCIAL WEBCASTERS**

via **Overnight Mail** by placing one true copy of the above document in a properly sealed and addressed envelope for courier overnight delivery, in conformity with the usual business practices of Stanford University, Federal Express and/or the U.S. Postal Service (where appropriate for delivery to post office boxes).

Proper service was made on the individuals appearing on the attached Service List.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 25th day of February 2003 at Palo Alto, California.



Joanne Newman

SERVICE LIST
Docket No. 2002-1 CARP DTRA3

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Rowlett, Texas 75089



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Tel: 650.723.5674
Fax: 650.723.4426

April 10, 2003

Via Federal Express

Copyright Arbitration Royalty Panel
ATTN: CARP Specialist
c/o Federal Express
208 Second Street, S.E.
Washington, D.C. 20003

(Ref. Tel. 202-707-8380)

**Re: Response to Request for Copyright Office to
Direct Parties to File Notices of Intent to
Submit Direct Cases**
Docket No. 2002-1 CARP DTRA 3

Dear Panel:

Counsel, on behalf of Collegiate Broadcasters, Inc. and twelve other individual stations, webcasters and broadcasters,¹ hereby submits for filing its **Response to Request for Copyright Office to Direct Parties to File Notices of Intent to Submit Direct Cases** as well as Proof of Service on the interested parties. Please find for filing an original plus five (5) copies of this pleading. We also are enclosing a copy of this pleading and request that you conform and return this to our office in the self-addressed, stamped envelope provided.

Thank you for your attention to this matter. Please do not hesitate to contact me if you have questions. My direct telephone number is: (650) 724-0517.

Sincerely,

Elizabeth H. Rader
Stanford Center for Internet and Society

¹ List of stations, webcasters and broadcasters is found on page 2 of the attached Response.

**Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.**

In Re	)	
Digital Performance Right	)	Docket 2002-1 CARP DTRA 3
In Sound Recordings and	)	
Ephemeral Recordings	)	
	)	

**RESPONSE TO REQUEST FOR COPYRIGHT OFFICE TO DIRECT PARTIES
TO FILE NOTICES OF INTENT TO SUBMIT DIRECT CASES**

RESPONSE

Collegiate Broadcasters, Inc. ("CBI") and the undersigned parties oppose the request of the RIAA et al for the Copyright Office to direct parties to file new notices of intent to submit direct written cases by Wednesday, April 9, 2003. This request is untimely, to the extent that it pertains to scheduling of deadlines in the CARP. Comments on scheduling were to be served December 2, 2002. Pursuant to the Copyright Office's Order of November 20, 2002, parties to the proceeding long ago filed notices of intent to participate, which inherently convey the intention to be an active participant in this proceeding in accordance with the applicable rule, and providing the name and address of persons on whom filings and direct case submissions should be served. *See* 67 Fed. Reg. 224. Additionally, the Copyright Office's February 6, 2003 order provides that parties must notify the Copyright Office of settlements.

The undersigned¹ submit that RIAA knows the parties with whom it and its division SoundExchange have reached agreement and can easily contact other parties

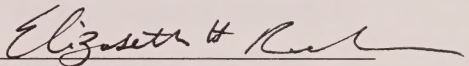
¹ Undersigned counsel to CBI is acting on behalf of Webcasters Alliance, Beethoven.com Hot Spots Hawaii, Inc., KUGS, KXUL, Wherever Radio, Dave Black, WSDP, KLSU, KBVR, National

directly via the addresses on the service list. The suggestion that the Copyright Office, with virtually no notice, require each CARP participant to file and serve a duplicative Notice of Intent by April 9, for the RIAA's convenience, has no other purpose than to increase the participants' cost and, because of the short time frame, perhaps result in accidental defaults by small entities that have every intention of submitting direct cases, either singly or as part of cooperating group. The Copyright Office should deny the Request.

Dated: April 10, 2003

Respectfully submitted,

Stanford Law School
Center for Internet & Society

BY: 

Elizabeth H. Rader
559 Nathan Abbott Way
Stanford, CA 94305-8610
Telephone 650-724-0517
Attorneys for Collegiate
Broadcasters, Inc.

On behalf of :

Collegiate Broadcasters Inc.
Webcasters Alliance
Kevin Shively, Beethoven.com LLC
Robert Abbott, Hot Spots Hawaii, Inc.
Jamie Hoover, Western Washington University (KUGS)
Joel R. Willer, University of Louisiana at Monroe (KXUL)
Thomas Mondell, Wherever Radio
Dave Black, University of Wisconsin-Madison (WSUM)
Bill Keith, Plymouth-Canton Community Schools (WSDP)
Rob Bigalke, Louisiana State University (KLSU)
Ann Robinson, Oregon State University (KBVR)
National Federation of Community Broadcasters
Deborah S. Proctor, WCPE

Federation of Community Broadcasters and WCPE only for the limited purpose of this Opposition.

PROOF OF SERVICE

I, Joanne Newman do hereby certify and declare as follows:

I am over the age of 18 years, and not a party to the instant proceedings. I am employed in the county of Santa Clara, California. My business address is: 559 Nathan Abbott Way, Stanford, California.

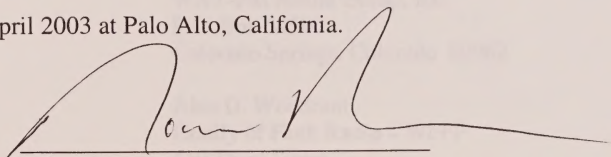
On April 10, 2003 I caused to be served the following document:

**RESPONSE TO REQUEST FOR COPYRIGHT OFFICE TO DIRECT
PARTIES TO FILE NOTICES OF INTENT TO SUBMIT DIRECT CASES**

via overnight courier, by placing one true copy of the above document in a properly sealed and addressed envelope for overnight delivery, and deposited at a station routinely maintained by Federal Express. For individuals with Post Office Box addresses, service was made by U.S. mail, by placing one true copy of the above document in a properly sealed and addressed envelope for express mail delivery, and deposited in a station mailbox routinely maintained by the U.S. Postal Service. Proper service was made on each individual appearing on the attached Service List.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 10th day of April 2003 at Palo Alto, California.

A handwritten signature in black ink, appearing to read 'Joanne Newman', is written over a horizontal line.

Joanne Newman

SERVICE LIST
Docket No. 2002-1 CARP DTRA3

Kenneth L. Steinthal
Weil, Gotshal & Manges LLP
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May 9, 2003

Via Federal Express

Copyright Arbitration Royalty Panel
ATTN: CARP Specialist
c/o Federal Express
208 Second Street, S.E.
Washington, D.C. 20003

(Ref. Tel. 202-707-8380)

Re: Docket No. 2002-1 CARP DTRA 3

Dear Panel:

Counsel, on behalf of Collegiate Broadcasters, Inc. hereby submits for filing an original plus five (5) copies of each of the following:

**Opposition to Motion of Copyright Owners and Performers for
Protective Order;
Non-Disclosure Certificate/Confidential Material (signed by Elizabeth Rader);
Non-Disclosure Certificate/Confidential Material (signed by Will Robedee);
Proposed Agreement Regarding Method of Service
Proof of Service**

We also are enclosing a copy of each of these documents and request that you conform and return these to our office in the self-addressed, stamped envelope provided.

Thank you for your attention to this matter. Please do not hesitate to contact me if you have questions. My direct telephone number is: (650) 724-0517.

Sincerely,

Elizabeth H. Rader

Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In Re	)	
Digital Performance Right	)	Docket 2002-1 CARP DTRA 3
In Sound Recordings and	)	
Ephemeral Recordings	)	
	)	

**OPPOSITION TO MOTION OF COPYRIGHT OWNERS AND
PERFORMERS FOR PROTECTIVE ORDER**

Collegiate Broadcasters, Inc. ("CBI") objects to the proposed Protective Order on the grounds Copyright Owners have made no showing to justify the terms of the two-tier order and that the order makes no provision for parties that are participating in the CARP without outside counsel to have access to documents designated "**RESTRICTED**" Protected Material. Many of the parties that filed Notices of Intent to participate in the new CARP are obviously small entities with limited financial resources and without outside counsel.¹ CBI once again asks that the Copyright Office consider the needs of small entities and make some provision in the Final Protective Order for at least one member of such organizations to have access to all the documents submitted as evidence in this CARP. A simple one- tier protective order that would give one individual, from each party, who agrees to be bound by the Order, access to all documents, regardless of their designation, would accomplish this purpose without unnecessary risk of disclosure of confidential information.

¹ Counsel for the Owners and Performers state that they have attempted to obtain the consent of counsel for Broadcasters to the terms of the proposed protective order, but, by their own account, have ignored the other 40-odd parties on the service list.

“It is axiomatic that a protective order may only be issued or maintained upon a showing of good cause.” *In re Lifescan, Inc. Consumer Litig.*, No. C-98 20321 JF (EAI), 1999 U.S. Dist. LEXIS 9894 (N.D. Cal. June 23, 1999). The moving party has the burden to establish the need to restrict access to documents produced in litigation. *See, e.g., Paramount Pictures Corp. v. Replay TV*, CV 01-9358 FMC, (C.D. Cal. December 13, 2002) (affirming Magistrate Judge’s Order denying entertainment companies’ motion for protective order to deny access to “a significant number” of internal business documents to attorneys with the Electronic Frontier Foundation, where the Court found that “the Entertainment Companies failed to demonstrate a sufficiently significant disclosure-related risk or danger to warrant the relief requested.”) Courts have recognized that there is a strong public interest in having access to legal proceedings, so that protective orders should be narrow and not require documents to be filed under seal unless public access would reveal legitimate trade secrets. *See Petroleum Prods. Antitrust Litig.*, 101 F.R.D. 34, 40-41 (C.D. Cal. 1984); *In re Agent Orange Prods. Liab. Litig.*, 104 F.R.D. 559, 566-68 (E.D. N.Y. 1985). Similarly, in *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983) the Sixth Circuit denied protection for internal tobacco industry documents, noting the natural desire of parties to shield prejudicial information from competitors and the public but holding that courts cannot accommodate this desire except in the narrow instance of legitimate trade secrets. *Id.* at 1180.

Here, Copyright Owners and Performers have offered nothing to meet their burden of proof, other than conclusory statements that protective orders, in

general, “allow parties to include information in their Direct or Rebuttal Cases that they believe requires confidential treatment, and to facilitate and expedite the handling of certain discovery in [the proceeding.” (quoting Order of March 29, 2001 in 2000-9 CARP DTRA 1 & 2) and that “these reasons for a protective order apply equally in this proceeding.” This falls far, far short of the standard for issuance of a protective order, which, in federal court litigation, requires that the moving party make “a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.” *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102, n. 16 (1981).

Two-tier protective orders are often appropriate in cases in which all parties are represented by outside counsel. In this CARP, however, small entities are unwilling to forego participation in the proceeding that will set royalty rates that will determine whether they can exploit the full potential of free expression and promote the broadest distribution of a wide variety of musical works, made possible by the Internet. All parties have a compelling need, in order to meaningfully participate in the proceedings, to have access to all documents bearing on the central issue of what royalty a willing buyer and willing seller would agree to, for the recordings covered by the compulsory licenses at issue, even if these documents are, as financial documents and agreements may well be, highly confidential. Accordingly, any Final Protective Order must provide for such direct access by parties that do not have outside counsel, if they sign the certificate agreeing to comply with its terms. Eliminating the RESTRICTED-Protected Material category, for which the moving parties have made absolutely

no showing of necessity, would properly balance the interests and solve the problem.

Dated: May 9, 2003

Respectfully submitted,

STANFORD LAW SCHOOL
CENTER FOR INTERNET & SOCIETY

BY: Elizabeth H. Rader

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Telephone 650-724-0517

Attorneys for Collegiate Broadcasters, Inc.

Before the

LIBRARY OF CONGRESS
COPYRIGHT OFFICE
Washington, D.C.

In the Matter of:

DIGITAL PERFORMANCE RIGHT)
IN SOUND RECORDINGS AND)
EPHEMERAL RECORDINGS)

Docket No. 2002-1 CARP DTRA3

NON-DISCLOSURE CERTIFICATE/CONFIDENTIAL MATERIAL

I certify my understanding that access to certain Protected Materials in the above-captioned proceeding is provided to me and any firm designated below pursuant to the terms and restrictions of the Interim Protective Order entered therein on April 29, 2003, that I have been given a copy of and have read the Interim Protective Order, that I and any firm designated below qualify to have access to Confidential Material as described in the Interim Protective Order, and that I and any firm designated below agree to be bound by that Order. I understand that the contents of the Protected Materials, and any notes, memoranda, or any other form of information reflecting the Protected Materials, shall not be disclosed to anyone other than in accordance with the Interim Protective Order, and shall be used only for the purpose of the above-captioned proceeding. I further understand that I shall return or destroy such Protected Materials as provided by the Interim Protective Order and that a violation of this certificate constitutes a violation of an order of the Librarian of Congress. If an "Organization" is identified below, I represent that I am authorized by that organization to make the above representations and understandings on its behalf.

By:

Elizabeth H. Kader

PRINT NAME:

Elizabeth Kader

Title:

Attorney

Organization:

Stanford Center for Internet & Society CB1

Party Represented:

Date:

May 8 2003

APR. 30. 2003 2:13PM - STANFORDLAWSCHOOL

LIBRARY OFFICE CARP

NO. 035. P. 21 020/020

Before the

LIBRARY OF CONGRESS
COPYRIGHT OFFICE
Washington, D.C.

In the Matter of:

DIGITAL PERFORMANCE RIGHT
IN SOUND RECORDINGS AND
EPHEMERAL RECORDINGS

)
)
)
)

Docket No. 2002-1 CARP DTRA3

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By: William C. RobedeePRINT NAME: William C. RobedeeTitle: Vice Chairman, CBIOrganization: Collegiate Broadcasters, Inc.

Party Represented: _____

Date: 5/7/03

**Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.**

In Re	)	
Digital Performance Right	)	Docket 2002-1 CARP DTRA 3
In Sound Recordings and	)	
Ephemeral Recordings	)	
	)	

PROPOSED AGREEMENT REGARDING METHOD OF SERVICE

In exchange for the agreement of Collegiate Broadcasters, Inc. (CBI) to accept documents by the same method of service, the undersigned agrees to accept service of all direct cases, motions, petitions, objections, oppositions and replies filed by CBI in this CARP by:

____ E-mail at the following address _____

____ Facsimile at the following number _____

Party: _____ Dated: _____

E-mail service should be addressed to:

erader@law.stanford.edu and willr@ktru.org

Facsimile service should be addressed to:

Elizabeth Rader (650)-723-4426

Will Robedee (713-348-5199

PROOF OF SERVICE

I, Joanne Newman do hereby certify and declare as follows:

I am over the age of 18 years, and not a party to the instant proceedings. I am employed in the county of Santa Clara, California. My business address is: 559 Nathan Abbott Way, Stanford, California.

On May 9, 2003 I caused to be served the following document:

OPPOSITION TO MOTION OF COPYRIGHT OWNERS AND PERFORMERS FOR PROTECTIVE ORDER;

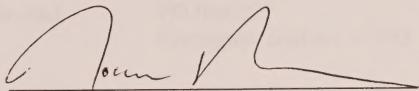
**(2) NON-DISCLOSURE CERTIFICATE/CONFIDENTIAL MATERIALS;
and**

PROPOSED AGREEMENT REGARDING METHOD OF SERVICE

via overnight courier, by placing one true copy of the above document in a properly sealed and addressed envelope for overnight delivery, and deposited at a station routinely maintained by Federal Express. For individuals with Post Office Box addresses, service was made by U.S. mail by placing one true copy of the above document in a properly sealed and addressed envelope for express mail delivery, and deposited in a station mailbox routinely maintained by the U.S. Postal Service. Proper service was made on each individual appearing on the attached Service List.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 9th day of May 2003 at Palo Alto, California.


Joanne Newman

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Docket No. 2002-1 CARP DTRA3

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